Can Undocumented Immigrants Still Have U.S. Work Rights? The Hoffman Decision and New Forms of Labor Power

By Samuel A. Butler

The contemporary United States is usually classified as a state of rights. The history of the ratification of the Constitution is inextricably bound up with that of the ratification of the Bill of Rights. So, the story goes, one ought not to define the prerogatives of government without simultaneously guaranteeing to the individual certain rights against the government.

resistance that goes beyond that of legal briefs and appe

This is the sort of the argument that the NLRB made in one of the case precedents considered in the majority opinion: ***NLRB v. APRA Fuel Buyers Group, Inc.***[8]

a_s of Hoff an

Now that I've sketched a brief outline of the *Hoffman* decision, the next question to ask is whether it matters and how. *Hoffman*, I will argue, threatens to sweep away important gains of the labor movement in the U.S. The ruling's most obvious and direct impacts have to do with the NLRA. These consequences can be divided along two axes: the first is the axis of documentation; the

the *Hoffman* decision, it would literally take an act of Congress—passing a law to invalidate *Hoffman*—for the worker to benefit from filing a claim.

Without such an act, employers are free in their attempts to extend *Hoffman* as much as possible. As accumulating case histories discourage employers from committing a particular infraction, so decisions like *Hoffman* tend to invite arguments by employers to universalize the restrictions on remedies far beyond the case and the law immediately concerned.[14] It is in this way that *Hoffman* represents the danger of excluding not only the backpay and reinstatement remedies of the NLRB, but remedies imposed by a host of other agencies charged with enforcing the protections afforded to workers by U.S. labor law. In some cases, these extensions are proposed by employers in court eager to expand their ability to exploit undocumented workers, while in other instances it is the enforcing agencies themselves which voluntarily circumscribe their sphere of action in response to a decision like *Hoffman*.[15]

Jur d ca and Extra ur d ca tru e

Some Labor Department officials in charge of enforcing national wage and hours laws have tried to assure the public that the principle expressed in *Hoffman* of finding workers' migration status to be relevant to their protections under U.S. labor law won't be extended to the Labor Department's enforcement policies.[16] However, it seems to me that *Hoffman* is important, and potentially quite relevant to a variety of contexts beyond questions of securing backpay under the aegis of the NLRA. It seems worthwhile and important for labor lawyers to continue to fight the extension of the *Hoffman* decision to other areas of labor law, but I want to suggest that the juridical front is simply one front in a much larger struggle. Fighting in the courts is important, but it is also important to remember that the very possibility of fighting in the courts was won by a lot of fighting outside of the courts. The current protections of U.S. labor law are what they are because of the history of the U.S. labor movement. Preserving and extending those protections involves carrying that struggle further.

That struggle can only be carried forward, I am convinced, by coming to terms with the changing face of labor in the U.S. The 1950's were the high water mark of union membership in the U.S., when 35% of the workforce belonged to a union. Today 12% belongs to a union.[17] Jennifer Gordon claims that 'the level of union organization among private-sector workers has now fallen below eight percent, and the rate of union representation among the bottom ten percent of wage earners is less than one percent.'[18] This deorganization of labor was effected in part by the shifting patterns of employment, from permanent, full-time and industrial employment to seasonal, temporary and part-time employment, often in the service sector.[19] As jobs have changed, workers have changed as well. The workforce participation of women has steadily increased, and issues of language, culture and migration status have steadily gained in importance.[20] At its worst, these circumstances have rendered many unions depleted and ineffective, unable to address the sexism and racism within their ranks and their leadership. At their best, these circumstances have provided the opportunity for new

forms of organization by groups whose concerns go beyond the provisions of the next contract to issues of community solidarity and social justice.[21]

Many of these issues are present in the struggles of the day laborers in Farmingville, New York. The history of the struggles of the day laborers in this sub

For Foucault, biopower is a relatively recent historical phenomenon, linked to the rise of the nation-state and capitalism. But, Giorgio Agamben has recently argued that it has been an integral part of political functioning since at least classical times.[31] Agamben attempts to formulate a notion of sovereign pow

of exception in U.S. labor law. The reference to *Del Ray* in the majority opinion says so much as: 'within the context of employment, this is a class of workers who can be harmed without juridical significance.'

What does it take for an action to be juridically significant? A few broad, uncontroversial aspects of a theory of juridical meaning may help establish my larger claims: Agamben uses the opposition of murder and killing outside of the protection of law as paradigmatic. Murder is juridically significant, it would seem, insofar as it is defined and forbidden in legal code and its commission leads to certain juridical consequences. By definition, killing outside the protection of the law cannot be addressed in a legal code. The analogy, then, would be to termination of employment. For a documented worker, there are many juridically defined legitimate and illegitimate grounds for termination. In the case of termination on illegitimate grounds, there are a variety of remedies to be applied. Thus termination in the case of a documented worker is juridically significant.

The case of the undocumented worker is similar, with the removal of the remedy of restitutive backpay. Breyer's dissent in *Hoffman* argued that removing this remedy amounts to the creation of an unenforced law. I tend to agree, but want to suggest that it is helpful to see the law not as 'unenforced', but rather as 'in force but not in effect'. This description leaves open the possibility of carrying struggle forward along many fronts; this analysis seems to permit the conclusion that *Hoffman* is a step towards rendering the termination of undocumented workers juridically meaningless.

It would be hyperbole to suggest straightforwardly that undocumented workers are thereby rendered *homines sacri*, but they can be fired for organizing a union without that firing having full legal significance. Perhaps they are *obreros sagrados*.

Looking at Farmingville alongside the *Hoffman* decision, however, casts the case in a much different light. It reminds us that the withdrawal of the protection of the NLRA is but the withdrawal of one sort of juridical protection, and that withdrawal can be combated by the deployment of other forms of juridical and meta-juridical power. There are other forms of juridical power in labor law and in criminal law. Supplementing these with the protections of community and solidarity makes those exercises of power more effective and more likely to succeed.

Undertaking the analysis through the work of Agamben permits the demonstration of the way in which different forms of power are interlaced and intermixed. All of this seems to point in support of the new form of labor organizing that goes beyond the worksite and beyond the contract, beyond the protections of the NLRA and beyond union bureaucracies. It is a form of organizing that is both new and older than the NLRA, reaching back to the beginnings of the labor movement. It is a form of organizing that well understands that every tool is a weapon if you hold it right.

Samuel A. Butler is a Ph.D. candidate at the State University of New York at Stony Brook.

cooperating without blurring their missions or job descriptions" ("A Gang Crackdown," *New York Times* [Mar. 20, 2005]). The Fall of 2007, however, another round of joint operations characterized as 'anti-gang' stings carried out by Suffolk and Nassau County police in conjunction with Immigration and Customs Enforcement, organized under the Department of Homeland Security. 186 people were arrested on Long Island. Of these, 28 were identified as gang members, while 129 others were claimed to be their 'associates', guilty of misdeeds as diverse as 'hanging out' with gang members or 'providing transportation, food and lodging' (Susana Enriquez, "Nearly 200 arrests in LI anti-gang raids," *Newsday* [Oct. 9, 2007]). In the aftermath of the raids, Thomas Suozzi, Nassau County Executive, demanded investigation into widespread misconduct by ICE agents, including the indiscriminate targeting of immigrant communities. Peter J. Smith, in charge of raids for ICE, responded to the charges by saying, "We didn't have warrants. […] We don't need warrants to make the arrests. These are illegal immigrants" (Nina Bernstein, "Raids Were a Shambles, Nassau Complains to U.S.," *New York Times* [Oct. 3, 2007]). It goes without saying that the desire by some law enforcement officials to be able to maintain cooperation and communication with communities of workers is in direct conflict with the desire by others to be able to target communities with raids.

[26] Karin Brulliard, "AFL-CIO Aligns with Day-Laborer Advocates," *Washington Post* (Aug. 10, 2006): A5. I am indebted to the Gregory DeFreitas for suggesting I consider the consequences of this alliance.

[27] Weber, Max. *Politik als Beruf*. (München: Duncker & Humboldt, 1926), 5.

[28]